

1 KAREN A. OVERSTREET
Bankruptcy Judge
2 United States Courthouse
700 Stewart Street, Rm. 6301
3 Seattle, WA 98101-1271
(206) 370-5330
4

5 UNITED STATES BANKRUPTCY COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 In re)
8) Chapter 7
STEVEN C. BATEMAN and)
9 VIRGINIA T. LEE,) Bankruptcy No. 07-13346
10 Debtors.)
Adversary No. 09-1345
11)
EDMUND J. WOOD,)
12)
Plaintiffs,)
13 v.) ORDER GRANTING IN PART
AND DENYING IN PART
SUMMARY JUDGMENT MOTION
14 DEUTSCHE BANK NATIONAL TRUST) BY LENDER'S PROCESSING
COMPANY; LONG BEACH MORTGAGE) SERVICES, INC.
15 COMPANY; WASHINGTON MUTUAL)
BANK; JP MORGAN CHASE BANK,)
16 N.A.; LENDER'S PROCESSING)
SERVICES, INC., NORTHWEST)
17 TRUSTEE SERVICES, INC.,)
Defendants)
18)
19)

20 This matter came before the Court at a hearing on
21 February 5, 2010, on the motion for summary judgment (the
22 "Motion") filed by defendant Lender's Processing Services, Inc.
23 ("LPS"). At the hearing, the Court rendered its oral ruling on
24 some, but not all, of the claims. The Court asked for
25 supplemental briefing from LPS and plaintiff, Edmund Wood, on two
26 issues: (1) Does the Washington Deed of Trust Act, Ch. 61.24,
27 R.C.W. (the "DTA"), provide exclusive remedies for violations of

1 the DTA related to the initiation of foreclosure so as to bar a
2 claim under the Washington Consumer Protection Act, Ch. 19.86,
3 R.C.W. (the "CPA"); and (2) when a foreclosure sale has been
4 restrained pursuant to the provisions of the DTA, can the
5 borrower/plaintiff prove "injury to business or property" due to
6 an alleged wrongful initiation of foreclosure in order to
7 establish a CPA violation?

8 The Court has considered all of the pleadings and evidence
9 in connection with the Motion and the supplemental briefs filed
10 by the parties relating to the questions posed in the preceding
11 paragraph. The following constitutes the Court's ruling and
12 order on the Motion.

13 **I. Standard on Summary Judgment**

14 The Court should grant summary judgment if no genuine issue
15 of material fact exists and the moving party is entitled to
16 judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving
17 party bears the initial burden of demonstrating the absence of a
18 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
19 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is
20 material if it might affect the outcome of the suit under the
21 governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
22 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When a properly
23 supported motion for summary judgment has been presented, the
24 adverse party "may not rely merely on allegations or denials in
25 its own pleadings." Fed.R.Civ.P. 56(e). Rather, the non-moving
26 party must set forth "specific facts" demonstrating the existence
27 of a genuine issue for trial. *Id.*; *Anderson*, 477 U.S. at 256.

1 All "justifiable inferences" are to be drawn in favor of the non-
2 moving party. *Anderson*, 477 U.S. at 255. When the record,
3 however, taken as a whole, could not lead a rational trier of
4 fact to find for the non-moving party, summary judgment is
5 warranted. See *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975,
6 988 (9th Cir. 2006).

7 **II. Facts**

8 Although under Rule 52(a)(3), Fed.R.Civ.P., the Court is not
9 required to make findings and conclusions in connection with a
10 summary judgment motion, the Court believes it would aid the
11 parties going forward to summarize the Court's oral ruling
12 identifying certain material facts the Court finds are disputed.

13 It is undisputed that LPS acts as an agent for banks to
14 process the necessary paperwork to pursue foreclosure when a
15 grantor under a deed of trust goes into default. LPS contends in
16 the summary judgment motion that its employees, Amy Weis and
17 Peter Read, were at all times acting within the scope of their
18 authority from Washington Mutual Bank ("WAMU") when they executed
19 documents relating to the foreclosure against the residence of
20 the debtors, Steven Bateman and Virginia Lee. Ms. Weis signed an
21 Appointment of Successor Trustee, which states that it was signed
22 in May 23, 2003 by "Deutsche as trustee for Long Beach Mortgage
23 Loan Trust 2006-1 by WAMU as successor in interest to Long Beach
24 Mort. co., its atty in fact by Amy Weis, AVP." The document
25 purports to appoint Northwest Trustee Services on May 23, 2007,
26 as successor trustee under the deed of trust against the debtor's
27 residence (the "Bateman Deed of Trust"). The document was not

1 recorded, however, until April 29, 2009. LPS contends, without
2 competent evidentiary support, that the May 23, 2003
3 acknowledgment date is a "scrivener's" error. Mr. Read signed an
4 assignment of the Bateman Deed of Trust by the "beneficiary" WAMU
5 to Deutsche as trustee for Long Beach Mort. Loan Trust 2006-1.
6 The document is signed by "WAMU as successor in interest to Long
7 Beach Mort. Co. by operation of law, by Paul Read, AVP." Despite
8 allegedly being signed in 2007, this document was also not
9 recorded until April 29, 2009. There are numerous and
10 conflicting copies of the Bateman promissory note in evidence,
11 each with undated endorsements. There is no evidence of who the
12 holder of the note was on May of 2007 or April of 2009, nor is
13 there any evidence that WAMU had authority to act as Deutsche's
14 attorney in fact or that Deutsch had any authority as trustee for
15 Long Beach Mort. Loan Trust at those times.

16 At the hearing, the Court ruled orally that there were
17 disputed material facts as to what authority WAMU had at various
18 relevant times and as to whether at all relevant times, LPS
19 employees were acting within the scope of the authority granted
20 to them by WAMU.

21 **III. Court's Ruling on Separate Claims¹**

22 The Motion seeks dismissal of all of the plaintiff's claims
23 against it, including plaintiff's claims for slander of title,
24 violation of the CPA, violation of the Fair Debt Collection
25 Practices Act, wrongful foreclosure in violation of the DTA, and

26 ¹ Included within this analysis are the claims on which the
27 Court orally ruled at the hearing on February 5, 2010.

1 breach of fiduciary and quasi fiduciary duty. Principally, LPS's
2 argument is that if its agents, Ms. Weiss and Mr. Read, were
3 acting at all relevant times as an agent of and with the
4 authority of WAMU, LPS has no separate liability under any of the
5 causes of action asserted by the plaintiff. LPS relies on *Davis*
6 *v. Bafus*, 3 Wn.App. 164, 167, 473 P.2d 192 (1970), which held
7 that "[A] complaint against a known agent, acting within the
8 scope of his authority for a disclosed principal, fails to state
9 a claim upon which relief may be granted against the agent." If,
10 however, an agent acts in a manner that exceeds the scope
11 authorized by the principal, the agent may be held liable for its
12 own acts. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929
13 P.2d 420 (1997). The Court has concluded that there is a
14 material issue of fact as to whether LPS was acting at all
15 relevant times within the scope of its authority, therefore, the
16 Court must examine the substance of the Motion as if LPS had
17 acted outside of its authority from WAMU.

18 A. Slander of Title.

19 In order to prove slander of title in Washington, plaintiff
20 must prove the following elements: (1) LPS made false statements
21 regarding the debtors' property; (2) the false statements were
22 made maliciously; (3) the false statements caused pecuniary loss
23 or injury to the debtors; (4) the false statements referred to
24 the sale or purchase of property; and (5) the slander must be so
25 great as to defeat the debtors' title to property. *Rorvig v.*
26 *Douglas*, 123 Wn.2d 854, 859-60, 873 P.2d 492, 496 (1994); *Brown*
27 *v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980).

1 The Court held in its oral ruling that LPS was entitled to
2 summary judgment on this claim because the plaintiff had failed
3 to show the existence of any pending sale, negotiations for a
4 sale or offers to purchase the debtors' property.

5 B. Violation of the Fair Debt Collection Practices Act.

6 In order to maintain a claim for violation of the Fair Debt
7 Collections Practices Act, the plaintiff must show that LPS was a
8 debt collector within the meaning of 15 U.S.C. § 1692a(6). The
9 Court concluded that in connection with the foreclosure action
10 initiated against the debtors' home, LPS's actions were not
11 directed at collecting "directly or indirectly, debts owed or due
12 or asserted to be owed or due another." 15 U.S.C. § 1692a(6).
13 Employees of LPS signed two documents in connection with the
14 foreclosure, an appointment of a successor trustee and an
15 assignment of the Bateman Deed of Trust. The Court finds that
16 these actions did not make LPS a debt collector under the Fair
17 Debt Collections Practices Act and that LPS's Motion should be
18 granted as to this claim.

19 C. Wrongful Foreclosure in Violation of the DTA.

20 LPS's motion for summary judgment seeks dismissal of this
21 claim on the ground that Washington does not recognize a common
22 law claim for wrongful "initiation" of a foreclosure proceeding,
23 citing *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003).
24 *Plein* and two other decisions cited by LPS, *Pfau v. Washington*
25 *Mut., Inc.*, 2009 WL 484448 (E.D. Wash. 2009); and *Krienke v.*
26 *Chase Home Finance, LLC*, 2007 WL 2713737 (Wash.App.
27 2007)(unpublished), hold that a homeowner who fails to avail

1 him/herself of the DTA's injunctive remedies to prevent the
2 foreclosure sale of a home, waives the right to contest the
3 foreclosure and trustee's sale. Once the sale has occurred,
4 these courts hold there is no remedy for wrongful foreclosure.
5 The court in *Krienke* held "[T]here is no case law supporting a
6 claim for damages for the *initiation* of an allegedly wrongful
7 foreclosure sale. Moreover, there is no statutory basis
8 supporting a claim for damages for wrongful *institution* of
9 foreclosure proceedings." *Krienke*, 140 Wash.App. at 1035
10 (emphasis in original). The cases support LPS's claim that there
11 is no common law cause of action for wrongful foreclosure in
12 Washington.

13 Count VII of the plaintiff's amended complaint alleges that
14 the defendants, including LPS, violated their duties under the
15 DTA in connection with the foreclosure of the debtors' home and
16 that any foreclosure of the property would therefore be wrongful.
17 Importantly, the debtors in this case took action to enjoin the
18 foreclosure before a trustee's sale occurred, so there is no
19 issue of waiver like in the cases cited in the preceding
20 paragraph. The DTA permits the court to make a determination of
21 whether the defendants violated their duties under the DTA.
22 Therefore, LPS is not entitled to summary judgment on the
23 plaintiff's wrongful foreclosure claim to the extent that the
24 claim seeks relief under the DTA and not the common law.

25 D. Breach of Fiduciary and Quasi Fiduciary Duty.

26 Paragraph VII of the plaintiff's amended complaint alleges
27 that each of the defendants owed a fiduciary duty or quasi-

1 fiduciary duty to the plaintiff. However, the plaintiff has
2 failed to identify the basis for which LPS had a duty to the
3 debtors or the trustee/plaintiff. LPS had no contractual
4 obligations to the debtors or the plaintiff, nor has the
5 plaintiff identified any statutory fiduciary obligation imposed
6 on LPS with regard to those parties. Accordingly, LPS is
7 entitled to summary judgment on this claim.

8 E. Consumer Protection Act Claim.

9 The parties provided supplemental briefing to the Court on
10 two arguments made by LPS relative to the plaintiff's CPA claim.
11 LPS argues that the DTA provides exclusive remedies for
12 violations of its provisions and thus precludes any CPA claim by
13 the plaintiff based upon LPS's acts in connection with the
14 foreclosure. LPS cites *CHD, Inc. v. Boyles*, 138 Wn.App. 131,
15 137, 157 P.3d 415 (2007) in support of its argument. The *CHD*
16 case, however, is another case on waiver, which holds that if a
17 borrower fails to obtain an injunction preventing the trustee's
18 sale, and the trustee's sale is concluded, the borrower waives
19 any grounds he or she has to invalidate the sale. The case does
20 not hold that having restrained a trustee's sale pursuant to the
21 terms of the DTA or by agreement with the foreclosing party, the
22 borrower has no right to assert a CPA claim.

23 Recent amendments to the DTA confirm that a borrower's
24 remedies in connection with a wrongful foreclosure are not
25 limited to those under the DTA, and may include a claim under the
26 CPA. Effective July 26, 2009, RCW 61.24.127 was added to the
27 DTA. This section specifically preserves certain claims of the

1 borrower or grantor when they fail to bring an action to enjoin a
2 foreclosure. Claims that are specifically not waived pursuant to
3 this section include common law fraud or misrepresentation,
4 violations of Title 19 RCW, and material violations of the
5 provisions of the DTA. The non-waived claims, however, are
6 subject to limitations, specifically that they may seek only
7 monetary damages and may not affect the validity of the
8 foreclosure sale. RCW 61.24.127(2)(f) also provides that any
9 claim brought under the CPA is limited to actual damages, treble
10 damages as provided for in RCW 19.86.090, and the costs of the
11 suit, including reasonable attorneys' fees.

12 LPS argues that because the amendment described above was
13 not effective until after the relevant actions in this case, the
14 amendment is irrelevant. That argument misses the point - this
15 case is not about waiver. The plaintiff has filed an action to
16 enjoin the foreclosure sale as required by the DTA and the sale
17 has not occurred. LPS concedes that if the sale is restrained,
18 the DTA provides numerous remedies, *e.g.*, to contest the
19 reasonableness of the fees demanded, to determine if the DTA was
20 violated, or to seek an award of attorneys' fees. RCW
21 61.24.090(2). Nothing in the statute or the case law precludes
22 an action under the CPA based upon violations of the DTA. The
23 fact that the legislature thought it necessary to clarify what
24 claims of the borrower are not waived when the borrower fails to
25 enjoin a trustee's sale, confirms that the identified claims,
26 including specifically a CPA claim, are available to a borrower
27 *who successfully enjoins* a sale. Otherwise, a borrower who fails

1 to enjoin a trustee's sale would be in a better position than a
2 borrower who exercises the right under the DTA to enjoin the
3 sale. Moreover, if the claims did not exist at all (*i.e.* because
4 remedies are confined only to the DTA), there would be no need to
5 discuss the circumstances under which such claims are ever
6 waived.

7 Accordingly, where, as in this case, the plaintiff has filed
8 an action to enjoin the trustee's sale and the trustee's sale has
9 not yet occurred, the plaintiff may assert a claim under the CPA
10 based upon the conduct of the defendants relative to the
11 foreclosure process.

12 The DTA, however, does not make a violation of its
13 provisions a *per se* violation of the CPA. Therefore, to
14 establish a violation of the CPA, the plaintiff must prove that
15 (i) LPS engaged in an unfair or deceptive act or practice; (ii)
16 such act or practice occurred within a trade or business; (iii)
17 such act or practice affected the public interest; (iv) the
18 plaintiff suffered an injury to her business or property; and (v)
19 a causal relationship exists between LPS's act or practice and
20 plaintiff's injury. *See Hangman Ridge Training Stables, Inc. v.*
21 *Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-93, 719 P.2d 531
22 (1986).

23 LPS makes two arguments in favor of dismissal of the
24 plaintiff's CPA claim: the plaintiff has not produced any
25 evidence that the debtors or the plaintiff suffered an injury to
26 business or property as a result of the acts taken by LPS, and
27 the plaintiff has not shown a sufficient causal connection

1 between the injury they allege and the acts of LPS. The Court
2 need not rule on the first issue because it agrees with LPS that
3 the plaintiff has failed to show a sufficient causal connection
4 between the injury the debtors are alleged to have suffered and
5 the very limited actions taken by LPS in connection with the
6 attempted foreclosure. The plaintiff must demonstrate that "but
7 for" the execution of the two documents described above by LPS's
8 employees, the debtors would not have incurred moving and living
9 costs and attorneys' fees in anticipation of the foreclosure.
10 *Indoor Billboard v. Integra Telecom*, 162 Wn.2d 59, 84, 170 P.3d
11 10 (2007). The Court finds that the execution of the two
12 documents signed by Mr. Read and Ms. Weis was not a significant
13 enough part of the foreclosure process so as to constitute a
14 proximate cause of any injury suffered by the debtors. For this
15 reason, LPS is entitled to summary judgment on the plaintiff's
16 CPA claim.

17 **ORDER**

18 Now, therefore, for the foregoing reasons, it is hereby
19 ORDERED that:

20 1. The plaintiff's slander of title claim against LPS is
21 DISMISSED.

22 2. The plaintiff's claim for violation of the Fair Debt
23 Collection Practices Act against LPS is DISMISSED.

24 3. To the extent plaintiff's claim for wrongful foreclosure
25 (Amended Complaint, par. VII) is pled as a common law tort claim
26 against LPS, it is DISMISSED. To the extent that claim is pled
27 as a claim for violation of the provisions of the DTA, LPS's

1 motion for summary judgment is DENIED.

2 4. The plaintiff's breach of fiduciary or quasi-fiduciary duty
3 claim against LPS is DISMISSED.

4 5. The plaintiff's CPA claim against LPS is DISMISSED.

5
6 ///END OF ORDER///

7
8 
9 United States Bankruptcy Judge
(Dated as of Entered on Docket date above)